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No. 92-1765

In The

Supreme Court of the United States

October Term, 1992

CULLEN DEVELOPMENT COMPANY, et al.,

Petitioners,

v.

HOUSING AUTHORITY, COUNTY OF SACRAMENTO, et al.,

Respondent.

Petition For Writ Of Certiorari To The California Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether a judgment entered in an action against a general partnership and the individual partners in favor of the plaintiff on a complaint for breach of contract, and in favor of the plaintiff on the general partnership's cross-complaint for breach of contract, on the basis of a pro se appearance of one of the partners, deprived the partnership of its right to due process.

Whether application of the doctrine of collateral estoppel to preclude a partner, as to whom the initial trial was stayed by reason of pending personal bankruptcy proceedings, from litigating affirmative defenses to an action for breach of contract, by reason of the prior judgment against the partnership on the cross-complaint, deprived the partner of his right to due process.

Whether the trial court's failure to give collateral estoppel effect to a determination by an administrative agency, made after entry of judgment against the partnership, but before entry of judgment against the partner, that cause did not exist to discipline the partner for violations of the Contractor's Law in connection with the construction project that was the subject of the litigation, deprived the partner of his right to due process.

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RESPONDENT'S BRIEF IN OPPOSITION

RESTATEMENT OF THE CASE

The underlying action arose out of a dispute over rights and obligations under a written agreement (hereinafter "the Contract") between Respondent, as owner, and Cullen Development Company, as general contractor, for construction of a multi-unit residential project known as the Rio Linda Family Residence ("the Project"). Cullen Development Company was a partnership comprised of Petitioner, and his brothers James Cullen and Richard Cullen. The Project consisted of three two-story frame buildings containing a total of twenty units, landscaping, and playgrounds.

The Project was awarded to Cullen Development Company on a low bid of $744,900. The Contract called for work to commence on the Project on August 20, 1984, and to be substantially completed by March 20, 1985. However, on April 22, 1985, with the Project only 46% complete, Cullen Development Company ceased work on the Project.

On the same date, Respondent made written demand to Cullen Development Company to return to the Project immediately and provide Respondent with a schedule of completion. Respondent received no response to the written demand. Respondent then took control of the Project, inventoried materials on the site, hired a full-time security guard, secured materials, and boarded up the Project to protect it from the weather. Respondent's architect inspected the Project and made an estimate of the cost of completion. The Project was ultimately completed by another contractor.

Respondent notified Cal-Farm Insurance Company ("Cal-Farm"), the surety which had provided a performance bond for Cullen Development Company, of the cessation of work, and requested payment under the bond. However, Cal-Farm had been placed under a receivership by the Insurance Commissioner of the State of California. Respondent intervened in the receivership proceedings, and after litigation over the adequacy of offers to purchase Cal-Farm, ultimately recovered $250,000 on the bond.

Respondent's First Amended Complaint, filed on July 22, 1985, named as defendants "James Cullen, Mark T. Cullen, and Richard Cullen, doing business as Cullen

Development Company." The First Amended Complaint also alleged facts concerning the capacity of Cal-Farm, its receivership, and a stay of actions against Cal-Farm that resulted from the receivership. Petitioner and his co-defendants, represented by the Law Offices of Charles W. Trainor, responded to the First Amended Complaint with a demurrer, which was overruled. They filed an answer on December 9, 1985 in which they pleaded as affirmative defenses the failure of the First Amended Complaint to state facts sufficient to state a cause of action, that Respondent was guilty of unclean hands, that Respondent's damages were not proximately caused by their conduct, that Respondent breached the Contract, and that Respondent had misrepresented material facts.

Respondent notified the trial court that the case was ready for trial by filing an At-Issue Memorandum on December 18, 1985. The court gave notice of arbitration and trial setting conferences on August 29, 1986, and trial was set for February 18, 1987. Shortly before trial, Defendants' attorneys sought Respondent's agreement to a stipulation for leave to file a cross-complaint with multiple causes of action.[1] Respondent, however, agreed to the stipulation on the condition that the cross-complaint contain only one cause of action for breach of contract. The cross-complaint was filed on February 5, 1987, less than two weeks prior to the trial date.

On February 6, 1987, Defendants filed a motion for an order amending the trial setting order to allow further

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[1] Under California law, leave of court must be obtained to file a cross-complaint after the cross-complainant's answer has been filed. Cal. Code Civ. Proc. § 428.50.

discovery. Counsel for Defendants cited the untimely filing of the Cross-Complaint, and their failure to complete discovery before the discovery cut-off in support of the motion. Counsel for Respondent submitted a declaration in which he stated counsel for Defendants had failed for nearly a year to inspect documents which had been set aside for them. The motion was denied on February 9, 1987. No courtrooms were available for trial on February 18, 1987, and the trial was continued to June 16, 1987.

On June 3, 1987, a Substitution of Attorneys[2] was filed with the trial court by which Respondent and his co-defendants substituted themselves, in propria persona, as counsel of record in place of their attorneys, which were then known as Trainor, Robertson & Smits. The Substitution of Attorneys included the statement "I accept the above substitution", followed by the signatures of the defendants. Petitioner signed twice, for himself in his individual capacity, and for the partnership. His signatures were dated May 29, 1987.

Notwithstanding the Substitution of Attorneys, Respondent's former counsel purported to make a "special appearance" on June 11, 1987 to move for an order to continue the June 16, 1987 trial date. A declaration in

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[2] Section 284 of California's Code of Civil Procedure provides as follows:

"The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:

1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes;

2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other."

support of the motion filed by William H. Davis, one of Petitioner's former attorneys, recited that he discussed outstanding bills at a meeting with Petitioner in February, 1987. According to Mr. Davis, he advised Petitioner at the February, 1987 meeting that his firm would have to withdraw from representation if Petitioner and his co-defendants did not bring their account current. Mr. Davis' declaration also described a subsequent meeting with Petitioner regarding outstanding fees on April 10, 1987. According to Mr. Davis, he mailed the Substitution of Attorneys to Petitioner on May 4, 1987.

Petitioner also filed a declaration in support of the motion, in which he stated that he owed his former attorneys $14,177.79, and had been unable, for several months, to pay them. The declaration also recited that Petitioner and his co-defendants had been " . . . unable to retain new counsel . . . " and had " . . . attempted to work out a payment schedule . . . " with their former attorneys. The motion was denied on June 11, 1987, five days before trial.

The matter was called on the morning trial calendar of the presiding judge of the Sacramento Superior Court on June 16, 1987, and assigned to Honorable Horace E. Cecchittini. Petitioner exercised a peremptory challenge under Section 170.6 of the California Code of Civil Procedure.[3] While making the sworn statement required for

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[3] Section 170.6 of the California Code of Civil Procedure provides, in pertinent part, as follows:

"(1) No judge, court commissioner, or referee of any superior, municipal or justice court of the State of California shall try any civil or criminal action or special proceeding of any

the challenge, Petitioner could not remember the name of the judge he was challenging. The presiding judge then trailed the matter as to Petitioner and Defendants James Cullen and Cullen Development Company to 1:30 p.m., to be tried before Honorable James I. Morris. Judgment was entered against Richard Cullen, who had failed to appear for trial, upon proof of the allegations of Respondent's First Amended Complaint.

At the afternoon hearing, Respondent appeared with a copy of an order of the United States Bankruptcy Court granting his petition for relief[4] under Chapter 11 of the Bankruptcy Code which he had filed only 10 minutes earlier. The trial court ordered proceedings stayed as to him. Trial proceeded as to James Cullen and Cullen Development Company, with Respondent in attendance at the counsel table. Petitioner informed the court that

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kind or character nor hear any matter therein which involves a contested issue of law or fact when it shall be established as hereinafter provided that the judge or court commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in the action or proceeding.

(2) Any party to or any attorney appearing in any such action or proceeding may establish this prejudice by an oral or written motion without notice supported by affidavit or declaration under penalty of perjury or an oral statement under oath that the judge, court commissioner, or referee before whom the action or proceeding is pending or to whom it is assigned is prejudiced against any such party or attorney or the interest of the party or attorney so that the party or attorney cannot or believes that he or she cannot have a fair and impartial trial or hearing before the judge, court commissioner, or referee. . . . "

[4] *In re: Mark Thomas Cullen*, E.D. Cal. No. 287-03434-A-11.

James Cullen had a speech problem, and requested permission to speak for him. The trial court inquired into the extent of James Cullen's problem, and permitted Petitioner to assist with trial.[5]

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[5] A portion of the transcript of the proceedings is reproduced in the Petition at page 10, Footnote 4. However, only a portion of the trial court's dialogue with James Cullen is reproduced, and missing text is not indicated by ellipses. The entire exchange was as follows:

"MARK CULLEN: Your honor, my brother has a little speech problem; do you mind if I speak for him?

THE COURT: Well, let me determine to what extent you have this speech problem.

Mr. James Cullen, have you understood all we have said here?

MR. JAMES CULLEN: No really. It's all above my head this level deal.

THE COURT: Well, you have previously had counsel, together with your brother, Mark Cullen, and you petitioned the Court to have counsel relieved and proceed in representing yourself, correct?

MR. JAMES CULLEN: Can I have my brother help me in this?

THE COURT: Mr. Bleier, do you have any objection to allowing Mark Cullen to assist his brother?

MR. BLEIER: I have no objection to allow him to assist, your Honor, but because he's in Pro Per I would want to have Mr. James Cullen's responses directly upon the recrod [sic], but I have no difficulty with their consulting.

THE COURT: All right. You can consult certainly and state anything for the record you want to Mark Cullen on behalf of your brother. But as far as entry of any of the admissions of the allegations in the complaint, they should come directly from your brother.

MR. MARK CULLEN: Okay. If you can ask questions one at a time instead of three-part questions, just one that might help.

MR. BLEIER: All right. Perhaps I should call Mr. James Cullen as a witness, your Honor. That might speed things along.

THE COURT: I think that's appropriate."

Judgment was formally entered as to Defendants James Cullen and Cullen Development Company in the amount of $366,261.94. on July 21, 1987, and as to Defendant Richard Cullen on June 22, 1987. The judgments were later amended, nunc pro tunc, to add the words " . . . and that Defendants take nothing by their Cross-Complaint."

In addition to its civil action, Respondent filed complaints against Cullen Development Company with the California Contractors State License Board ("CSLB"), the administrative agency responsible for enforcing the California Contractors Law. In response to the complaints, the Registrar of Contractors began proceedings against Cullen Development Company in November, 1988 to determine whether it should be disciplined for violations of the Contractors Law. As noted in the Petition,[6] the proceedings resulted in an administrative decision which included findings critical of Respondent, and in favor of Cullen Development Company on all charges except for failure to substantially account for funds on the Project. Petitioner's contractor's license was suspended for 30 days.

Petitioner failed to file status reports, schedules, or a plan of reorganization with the Bankruptcy Court, and failed to attend the section 341 meeting of creditors. After giving Petitioner numerous notices and warnings of sanctions, the Bankruptcy Court permitted him to enter a voluntary dismissal and ordered the case dismissed on

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[6] Appendix D to the Petition.

December 7, 1989. Respondent filed another at-issue memorandum with the trial court on December 27, 1989.

On May 20, 1990, Petitioner filed another petition for relief under Chapter 11 of the Bankruptcy Code.[7] On June 18, 1990, Petitioner filed a schedule of unsecured creditors on which he listed a debt to Trainor, Robertson & Smits in the amount of $8,000. Petitioner did not serve Respondent with the second bankruptcy petition, or advise the trial court of the automatic stay. On August 16, 1990, the United States Trustee filed a motion by which it requested conversion or dismissal of the case, or appointment of a trustee, or establishment of a bar date. An order of dismissal was entered on October 9, 1990.

On August 14, 1990, more than five years after the complaint was filed, Petitioner filed a motion requesting leave to amend his Cross-Complaint to add fifteen causes of action. Respondent cited the decision in the administrative proceedings as grounds for the amendment. An order denying the motion was entered on September 18, 1990. On September 27, 1990, Respondent moved for summary judgment on the Cross-Complaint, arguing that the issue of Respondent's liability on the Cross-Complaint was adjudicated by the judgments entered June 16, 1987, and that the doctrine of collateral estoppel precluded Petitioner from further litigation of issues raised by the Cross-Complaint. The evidentiary support for Respondent's motion established Petitioner's capacity as

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[7] *In re: Mark Thomas Cullen*, E.D. Cal. No. 290-03451-A-11.

managing general partner of Cullen Development Company, and the finality of the June 16, 1987 judgment against the partnership. The motion was granted.

On February 11, 1991, the matter was assigned for trial to Department 6 of the Sacramento Superior Court before Honorable James I. Morris, with both parties waiving trial by jury. Respondent filed a written motion in limine for an order prohibiting, inter alia, introduction of evidence of damages pleaded in the Cross-Complaint. In addition to the matters set forth in the written motion, Respondent expanded the first category to seek to prohibit evidence in support of the affirmative defenses to the First Amended Complaint during pre-trial discussions in chambers. Respondent also orally moved to exclude evidence of the decision from the administrative proceedings.

Although the trial court initially granted the motion to the extent that the motion sought to preclude evidence of Petitioner's damages and the administrative decision, it asked for authority to support exclusion of evidence in support of Petitioner's affirmative defenses. The first day of trial then concluded after Respondent's opening statement. The trial court began the second day of trial by ruling against Respondent's motion in limine to the extent it sought to preclude evidence in support of Petitioner's affirmative defenses. However, after Respondent cited *Torrey Pines Bank* v. *Superior Court*, 216 Cal.App.3d 813, 265 Cal.Rptr. 217 (1989) as additional authority, the trial court agreed to consider the matter further.

Trial proceeded with Respondent's case in chief. On the afternoon of the second day of trial, the trial court indicated that, after review of *Torrey Pines Bank*, it was

inclined to grant Respondent's motion in limine as to evidence in support of Petitioner's affirmative defenses.

At the conclusion of trial, the trial court stated its findings as follows:

> . . . I will find by a preponderance of evidence that plaintiff has prevailed in their allegations of formation of and then breach of contract by defendant and award a judgment in Plaintiff's favor against defendant in the amount of three hundred sixty-two thousand six hundred and one dollars.

However, the trial court then stayed entry of judgment pending submission of written argument on the issue of the collateral estoppel effect of the administrative decision. After considering written arguments submitted by the parties, the trial court declined to give collateral estoppel effect to the administrative decision.[8] Judgment was entered on April 4, 1991 in favor of Respondent on the complaint in the amount of $362,601, and against Petitioner on the Cross-Complaint.

The Court of Appeal of the State of California for the Third Appellate District affirmed judgment against Petitioner on November 20, 1992. The Supreme Court of the State of California denied a Petition for review on February 10, 1993.

Petitioner also pursued an action against his former attorneys for professional negligence.[9] In a decision

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[8] See Appendix C to the Petition.

[9] *Cullen* v. *Trainor, Robertson, Smits & Wade*, Sacramento Superior Court No. 520230.

issued January 4, 1993, and modified February 1, 1993,[10] the Court of Appeal of the State of California for the Third Appellate District affirmed a judgment of dismissal, and the California Supreme Court denied a Petition for Review on March 31, 1993.

SUMMARY OF THE ARGUMENT

Facts which Petitioner describes as "critical" to his Petition are suspect or demonstrably false. Petitioner's accounts of the events connected with the withdrawal of his former attorneys are not supported by the record below, and contradict a schedule filed by Petitioner in bankruptcy proceedings. The record below does not support Petitioner's contentions that his former attorneys abandoned him, that James Cullen was incapable of appearing for himself or Cullen Development Company.

No appeal having been taken, the judgments entered against Petitioner's co-defendants on June 16, 1987 are final. The scope of Petitioner's appeal was limited to the judgment entered April 4, 1990, and nonappealable orders entered prior to those judgments from which Petitioner could not have otherwise appealed. The Court of Appeal properly declined to consider Petitioner's contentions of error at the 1987 trial.

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[10] The opinion, modified opinion, and order of the California Supreme Court are attached as Appendix A, Appendix B, and Appendix C, respectively. Pursuant to Rule 201 of the Federal Rules of Evidence, Respondent requests the court to take judicial notice of the opinions and order.

The trial court correctly applied the doctrine of collateral estoppel in precluding Petitioner from relitigating the judgment against Cullen Development Company, and in declining to find that Petitioner's successful defense of the administrative proceedings constituted an adjudication of issues of Respondent's civil action.

ARGUMENT

A. CORRECTIONS TO MISSTATEMENTS OF FACT

Many factual assertions in the Petition are inaccurate and/or unsupported by the record below. While some of the inaccuracies are inconsequential, others concern matters described by Petitioner as "critical," such as the declaration filed in support of the defense motion to continue the June 16, 1987 trial date:

> On June 8, 1987, Trainor called petitioner, who was residing in Arizona, stating that the court would require a Declaration from petitioner in order to hear a Motion to Continue the scheduled trial date. Trainor dictated the contents of said Motion (dated June 8, 1987) that Trainor requested. Two critical statements in the Declaration were that petitioner allegedly owed Trainor legal fees, and that, petitioner desired to be placed, In Pro Se. *Each of these statements were fabricated by Trainor to delay the pending trial date.* [¶]At the time of this Declaration, Trainor knew that the firm was paid in full, with extra monies still on retainer.

Petition, pp. 7-8, emphasis original.

Petitioner's description of the events suggests that he drafted the declaration as his former attorney dictated the contents over the telephone. Petitioner does not explain why, if he knew that the statements made in the declaration were untrue, he nevertheless signed the declaration. Moreover, Petitioner's contention that the "two critical statements" were fabricated raises questions about the propriety of his role in causing the declaration to be filed, and the credibility of representations he makes in his Petition.

In his declaration, Petitioner swore that he was indebted to his attorneys for approximately $14,000, and had not been able to pay them for several months. He also stated that he and his co-defendants had attempted to work out a payment schedule with their former attorneys. As noted above, Petitioner acknowledged a debt to his former attorneys in his second bankruptcy action. In a memorandum filed on October 16, 1990 in opposition to Respondent's motion for summary judgment, Petitioner contended that his former attorneys had "squandered" the funds that Petitioner had available for litigation. Finally, Petitioner alleged in his action against his former attorneys that they had informed him that they did not file a Cross-Complaint due to Petitioner's lack of funds.[11]

In a declaration filed in support of the motion to continue the June 16, 1987 trial, William H. Davis, one of Petitioner's former attorneys, stated that he discussed outstanding bills at a meeting with Petitioner in February, 1987. According to Mr. Davis' declaration, he advised

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[11] See Appendix A to this Brief in Opposition, p. A-5.

Petitioner at the February, 1987 meeting that his firm would have to withdraw from representation if Petitioner and his co-defendants did not bring their account current. Mr. Davis' declaration also describes a subsequent meeting with Petitioner regarding outstanding fees on April 10, 1987.

Even if one accepts that Mr. Davis drafted his declaration to portray himself in a favorable light, the detail recited in his declaration, including dates and names of other persons in attendance at the meetings, has a greater air of credibility than the conclusory allegations of Petitioner's account. Furthermore, viewed in the light of admissions made by Petitioner in other proceedings, his contention that the statement concerning unpaid legal fees was a fabrication is not credible. His assertion that his former attorneys fabricated the statement that Petitioner wished to represent himself is even less credible. According to Petitioner's own account, Trainor dictated the contents of Petitioner's declaration ten days after Petitioner signed the Substitution of Attorneys, and five days after the Substitution of Attorneys was filed with the trial court.

Undoubtedly, the declarations filed with the motion to continue the June 16, 1987 trial date, as well as the procedural maneuvers and bankruptcy filing on the trial date, were part of a poorly conceived and ineffectual plan to delay trial. It also appears obvious that Petitioner was a willing participant in the plan. Since that time, however, he has freely rewritten the history of those events to suit the needs of the moment.

In this action, the action against his former attorneys, and the two bankruptcy proceedings, Petitioner has shown a proclivity to recast the past to suit current objectives. For example, the proposed First Amended Cross-Complaint submitted with Petitioner's motion for leave to amend alleged that Cullen Development Company was an existing entity. Only two months later, while opposing Respondent's motion for summary judgment on the Cross-Complaint, Petitioner argued that Cullen Development Company ceased to exist subsequent to April 22, 1985.

In his declaration in support of his motion for leave to amend the cross-complaint, Petitioner stated that the attorney who represented him in his first bankruptcy proceedings handled the case to his satisfaction. However, only one month later, in his second bankruptcy action, Petitioner filed a brief in opposition to the U.S. Trustee's motion in which he asserted that his bankruptcy attorney had failed to represent his best interests.

B. THE PETITION IS UNTIMELY TO THE EXTENT IT CHALLENGES THE 1987 JUDGMENTS AGAINST PETITIONER'S CO-DEFENDANTS

Petitioner's invitation to this Court to review the judgments entered against his co-defendants in 1987 must be denied as beyond the jurisdiction of this Court. "The appellate jurisdiction in the Federal system of procedure is purely statutory. [Citation.]" *Heike* v. *United States*, 217 U.S. 423, 428, 30 S.Ct. 539, 54 L.Ed. 821 (1910). By statute, the jurisdiction of this court extends to "final judgments or decrees rendered by the highest court of a State in

which a decision could be had . . . ." 11 U.S.C.S. § 1257, subd. (a). In *Hammerstein* v. *Superior Court*, 341 U.S. 491, 71 S.Ct. 820, 95 L.Ed. 1135 (1951), this court dismissed a writ of certiorari, even though it concluded that jurisdiction existed, because the petitioner had failed to appeal from entry of default judgment. *Id.*, at p. 492.

Petitioner devotes a considerable amount of argument to the June 16, 1987 trial. He contends that it was error for the trial court to permit trial to proceed as to Cullen Development Company on the basis of the presence of James Cullen, one of the partners.[12] He contends that it was error for the trial court to permit trial to proceed against James Cullen, who he characterizes as "illiterate and speech impaired."[13] He invites this court to review not only the judgment entered against him in 1992, but also the judgment entered against Cullen Development Company in 1987.[14]

No appeal was taken by Richard Cullen, James Cullen, or Cullen Development Company from the judgments entered against them in 1987. The scope of Petitioner's appeal was limited to the judgment entered April 4, 1990, and nonappealable orders entered prior to those judgments from which Petitioner could not have otherwise appealed, the orders granting Respondent's motion for summary judgment, denying Petitioners motion for leave to amend his Cross-Complaint, and granting Respondent's motion in limine. Accordingly,

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[12] Petition, pp. 18-28.

[13] *Ibid., supra*, at p. 29.

[14] *Ibid., supra*, at p. 34.

this court should conclude, as did the Court of Appeal, that the judgments against Petitioner's co-defendants " . . . are now final and may not be attacked . . . ."[15]

C. CULLEN DEVELOPMENT COMPANY WAS NOT DEPRIVED OF ITS RIGHT TO DUE PROCESS

This court recently visited the subject of pro se appearances by collective entities in *Rowland* v. *California Men's Advisory Council*, ___ U.S. ___, 113 S.Ct. 716, 121 L.Ed.2d 656 (1993). Although the rule against pro se appearances by artificial entities in federal courts is well-established, a partner was allowed to appear for a partnership in *United States* v. *Reeves*, 431 F.2d 1187 (9th Cir. 1970) (per curiam). *Reeves* was described as an "aberrant case" which neither followed nor established "federal precedent." *Rowland, supra*, ___ U.S. at p. ___, slip opinion at p. 7, and fn. 5. However, the rationale for the prohibition does not have a constitutional dimension, but is based upon " . . . the Centuries-old concept of a Court, having a lawyer before it who has been qualified to practice, and who is subject to the Court's control." *Turner* v. *American Bar Assn.*, 407 F.Supp 451, 476 (ND Tex., 1975).

California law does not prohibit a partner from appearing pro se as the representative of a general partnership. While there is no definitive statute or case law which affirmative extends the right of self-representation to partnerships, a justice of the California Supreme Court

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[15] Appendix B to the Petition, p. B-4.

has observed that partners have long enjoyed the privilege of appearing in pro se on behalf of their partnerships. See *Merco Constr. Engineers, Inc.* v. *Municipal Court*, 21 Cal.3d 724, 734, 147 Cal.Rptr. 631 (1978). There are significant differences between corporations and limited partnerships, to which Petitioner freely analogizes, and general partnerships, which justify treating the entities differently.

While a corporate or limited partnership organization provides the individual equity holders with limitations on risk, they also severely limit their right to control the operations of the organization. The equity holders own an interest in the entity itself. See, e.g., Cal. Corp. Code § 15518. In a general partnership, on the other hand, "a partner is coowner with the other partners of specific partnership property holding as a tenant in partnership." Cal. Corp. Code § 15025, subd. (1). As the entity whose laws give existence to and govern the operation of the various organizations, the State of California is uniquely qualified to determine the circumstances under which they may appear in its courts. While the Petition establishes a number of uncontested truisms about the nature of business organization, it fails to provide a compelling argument that would justify review of California's practice of permitting general partnerships to appear in pro se, much less a ruling that the practice is constitutionally deficient.

In any event, the Substitution of Attorney was made "upon the consent of both client and attorney, filed with the clerk . . . ." Cal. Code Civ. Proc. 284, subd. (1). Notwithstanding Petitioner's contention that he and his co-defendants were abandoned by his former attorneys, the document itself and all inferences that can be drawn

from the record indicate that Petitioner consented to the substitution.

Of the three methods of effecting a substitution of counsel under California law, only one method does not require the active participation of the court. Had Petitioner or his co-defendants refused to sign the Substitution of Attorneys, their former attorneys would have had to obtain leave of court to withdraw their appearance. Cal. Code Civ. Proc. 284, subd. (2). Petitioner and his co-defendants would then have had an opportunity to argue that a substitution of counsel would prejudice their interests. But the objective of the Substitution of Counsel, as Petitioner readily admits, was to delay trial. When that tactic proved ineffective, Petitioner fell back upon his second line of defense and petitioned for protection under the Bankruptcy Code. As a willing participant in the scheme to delay trial, Petitioner should not now be heard to complain that the judgments entered against his co-defendants was the result of abandonment by their former attorneys.

D. PETITIONER WAS NOT DEPRIVED OF HIS RIGHT TO DUE PROCESS

In essence, Petitioner's complaint is with entry of judgment against him. It is important, in considering his arguments, to bear in mind that the action was commenced on July 22, 1985, that the trial court gave notice of the final stages of the litigation on August 29, 1986, and that trial did not take place until nearly two years after the complaint was filed. Petitioner is simply mistaken when he asserts that due process guarantees him the

right to a trial on the merits of each issue, in the broadest sense of a trial.

Procedural devices, such as the motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, California's statutory demurrers, and the motion for summary judgment may severely restrict or eliminate the trial on the merits without depriving litigants of the right to due process. Due process requires notice and the *opportunity* to be heard. Petitioner had the opportunity to have a trial on the merits on June 16, 1987. When the rights and liabilities of Cullen Development Company were adjudicated, the scope of Petitioner's possible defenses were necessarily narrowed, as Petitioner had no rights against Respondent which did not arise out of the Contract.

Petitioner's argument against application of the doctrine of collateral estoppel relies heavily upon his preceding arguments concerning the wrongful conduct of his former attorneys in "abandoning" him, and the trial court in permitting the "abandonment" and in entering judgment against the partnership on the basis of James Cullen's appearance. For a substantive rule of collateral estoppel against governmental agencies, the Petition suggests privity without limitation.

The mere nature of the parties, however, is an insufficient basis to establish privity. The fact that Respondent and the CSLB are both public entities is not, in itself, sufficient to support a finding of privity. See *People* v. *Dawkins*, 195 Cal.App.3d Supp. 1, 6-7, 241 Cal.Rptr. 456 (1987); *City of Gilroy* v. *State Bd. of Equalization*, 212

Cal.App.3d 589, 606-607, 260 Cal.Rptr. 723 (1989). "Privity . . . 'represents a legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford application of the principal of preclusion.' " *Dawkins, supra*, 211 Cal.App.3d Supp. at p. 6, quoting Vestal, *Preclusion/Res Judicata Variables: Parties* (1984) 50 Iowa L.Rev. 27, 45.

It is not merely the relationship, but the functions and roles played by the two parties in the related matters that is determinative on the issue of privity. See *Dawkins, supra*, 195 Cal.App.3d Supp. at pp. 6-7; *City of Gilroy, supra*, 212 Cal.App.3d at pp. 606-607. Respondent, as the owner of any construction project, had the right to complain to the CSLB about the conduct of a contractor. Like any other owner, it was not a party to the administrative proceedings. It did not direct or control the prosecution of the proceedings, and did not have the right to introduce evidence, cross-examine witnesses, argue points of law, or seek further review of the administrative decision. Petitioner had all of those rights.

Although the administrative decision is final and conclusive on the issue of whether cause existed to impose discipline against Cullen Development Company, the administrative decision is based upon obvious errors of law. For example, Petitioner was allowed to parade disgruntled contractors before the administrative law judge to prove "a well-developed style of doing business." Respondent had no opportunity to cross-examine the accusers, call rebuttal witnesses, or object to the use of evidence of past conduct to prove conduct on a specific occasion. Respondent did not have the opportunity to advise the administrative law judge that the style of

business consisted of actions mandated by federal regulations, such as impounding of funds to satisfy pending wage claims. See, e.g., 29 C.F.R. § 5.5(b)(3).

CONCLUSION

Petitioner's contention that an injustice resulted from the sum of the errors is based upon a contrived statement of facts. However, Petitioner has made so many contradictory factual allegations in this and related litigation that his version of the events is not credible. If there has been any consistency in Petitioner's approach, from construction of the Project through each successive brief, it has been his recasting of the facts to shift the blame to others. While Petitioner may or may not be solely responsible for the adverse judgments entered against him and his co-defendants, he was a willing participant in the scheme to avoid trial. Unlike Respondent, who had no opportunity to defend itself against the recriminations of disaffected contractors, Petitioner had opportunity enough to defend against the complaint and prosecute a Cross-Complaint.

Whether that the opportunity was squandered by others, or by Petitioner himself, due process does not require that Petitioner be given a second opportunity.

Dated: June 4, 1993

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

MARK T. CULLEN, Plaintiff and Appellant, v. TRAINOR, ROBERTSON, SMITS & WADE et al., Defendants and Respondents.	)	C012365 (Super. Ct. No. CV520230 (Filed Jan. 4, 1993)

This is an appeal from a judgment following dismissal after a general demurrer was sustained without leave to amend. Plaintiff Mark Cullen seeks to prosecute a cause of action against defendants Trainor, Robertson, Smits & Wade, the law firm whose attorneys represented him during a lawsuit brought against him for breach of contracts to construct public housing for the County of Sacramento. He claims that the law firm abandoned its defense and failed to prosecute a counter claim against the plaintiff in that action. A general demurrer was sustained on the ground that the action is barred by the statute of limitations, Code of Civil Procedure section 340.6.[1]

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[1] References to a section are to the Code of Civil Procedure unless otherwise indicated.

Cullen contends that the trial court erred in applying the statute of limitations. We will conclude that the statute of limitations began on the date the judgment in the underlying action was entered against the partnership of which Cullen was a member, October 13, 1987, for that is the date upon which he suffered injury to his interests. That date is more than one year from the date on which the complaint in this action was filed, April 29, 1991. We also will conclude that the limitations period was not tolled by reason of an alleged fraud in the nondisclosure of defendants' failure to meet the claims statute, an alleged predicate to success on the cross-complaint brought in the Housing Authority action, because such a fraud was not a legal cause of the injury sustained.

We will affirm the judgment (order of dismissal).

FACTS AND PROCEDURAL BACKGROUND

Cullen's first complaint for malpractice in this action was filed on April 29, 1991. The verified complaint was filed in propria persona, on his own behalf and in the name of Cullen Development Company, a partnership. He alleged, among other things, that Cullen Development Company suffered severe financial damages as a result of the same alleged attorney malpractice of which he complains. A demurrer was sustained to the first complaint as to Cullen Development Company without leave to amend and with respect to Cullen with leave to amend. No issue is tendered on the appeal concerning the propriety of the demurrer granted with respect to Cullen Development Company.

The demurrer we review was granted as to Cullen's first amended complaint, styled "Further Amended First Amended Complaint" consisting of an introduction and four counts. Stripped of conclusions of law, evidentiary matter (see 4 Witkin, Cal. Procedure (3d ed. 1985) Pleading, §§ 338, 346), and immaterial asides the complaint makes the following material allegations of fact.

In September 1985 Cullen retained Trainor, Robertson, Smits & Wade (Counsel) to represent him in the defense and prosecution of a cross-complaint in a lawsuit brought against him by the Housing Authority of Sacramento County (Housing Authority). Cullen was led to believe that the cross-complaint would include counts stating causes of action for breach of contract and tortious breach of contract. Counsel failed to file a governmental tort claim as a predicate for the contemplated cross-complaint within the period prescribed by statute. The cross-complaint, filed on February 5, 1987, asserted only a cause of action for breach of contract. Counsel also failed to prepare properly for trial. Counsel concealed the true reason for failing to file the cross-complaint as originally proposed and informed Cullen that the original scope of the cross-complaint could be achieved under affirmative defenses and by way of an amendment to conform to proof at trial.

Less than a month before the scheduled trial date of June 16, 1987, Counsel informed Cullen that they desired to terminate the attornment. At their request, Cullen signed the papers substituting him as his own attorney and the substitution was filed two weeks prior to trial. The day before trial Counsel advised Cullen that if the matter came on for trial as scheduled he could delay the

trial by peremptorily challenging the first judge assigned and filing a bankruptcy petition to obtain a stay of pending proceedings against him. Counsel failed to inform Cullen of the proper method to file a bankruptcy when both an individual and a partnership were involved. In terminating the attornment Counsel "again concealed their procedural errors, by not informing [Cullen] of [their] procedural errors to date."

Cullen had a meritorious defense and counterclaim in the Housing Authority lawsuit. If Counsel had acted competently in representing him he would have prevailed. During 1989 Cullen represented himself and Cullen Development Company, a general partnership operating under a general building contractor's license of which Cullen was the qualifying partner, in an administrative hearing before the Registrar of Contractors, defending against an accusation that discipline was warranted against the license because of failure to complete the contracts in issue in the Housing Authority's lawsuit without legal excuse. On June 25, 1990, the Registrar of Contractors issued a decision in the matter finding that discipline was not warranted on the ground of failure to complete the contracts because the failure was caused by misconduct of the Housing Authority in the administration of the contracts.

On August 30, 1990, Cullen filed a motion to amend his cross-complaint in the Housing Authority lawsuit. On September 7, 1990, the motion was denied. On October 30, 1990, the court granted a partial summary judgment motion in favor of the Housing Authority denying relief under the cross-complaint. On April 4, 1991, judgment

was entered against Cullen in favor of the Housing Authority.

Despite numerous opportunities to disclose their negligence in failing to file a governmental tort claim counsel failed to do so. Counsel concealed this negligence by falsely stating to Cullen, for the purpose of deceiving him, that the reason they delayed in filing the cross-complaint and filed the abbreviated version of the cross-complaint was Cullen's lack of funds. The true reasons were that counsel failed to research the Tort Claims Act in a timely fashion, failed to file a governmental tort claim within the required time, and failed to do the research necessary to find an exception to cure their error.

Cullen relied upon the misrepresentation in believing that counsel had made a zealous effort to file the appropriate cross-complaint. He did not discover Counsel's failure to file a governmental tort claim until the fall of 1989. That ends the pertinent allegations in Cullen's complaint.

Counsel demurred contending that Cullen's first amended complaint fails to state a cause of action not barred by the applicable statutes of limitations. The demurrer attacks the complaint, viewed in the context of matters occurring in the Housing Authority lawsuit – of which judicial notice had been taken in proceedings on the earlier demurrer. The record of that litigation shows the following. The defendants in the Housing Authority lawsuit included Cullen and Cullen Development Company. When the matter came on for trial on June 16, 1987, it was stayed as to Cullen because of his bankruptcy

petition filing but went forward as to the other defendants. At the conclusion of the trial, the court announced that judgment would be granted in favor of the Housing Authority against Cullen Development Company. On October 13, 1987, that judgment was entered.

After the bankruptcy stay was lifted as to Cullen the Housing Authority lawsuit proceeded as to him. The issues tendered in the cross-complaint were resolved in favor of the Housing Authority in a partial summary judgment which was based upon the theory the earlier judgment against Cullen Development Company warranted issue preclusion against Cullen.

The trial court in this action sustained the demurrer to Cullen's first amended complaint.

DISCUSSION

Introduction

I

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187].) Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 42 [172 P.2d 867].) When a demurrer is sustained, we determine whether the complaint states

facts sufficient to constitute a cause of action. (See *Hill v. Miller* (1966) 64 Cal.2d 757, 759 [51 Cal.Rptr. 689, 415 P.2d 33].) And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. (*Kilgore v. Younger* (1982) 30 Cal.3d 770, 781 [180 Cal.Rptr. 657, 640 P.2d 793]; *Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 636 [75 Cal.Rptr. 766, 451 P.2d 406].) The burden of proving such reasonable possibility is squarely on the plaintiff. (*Cooper v. Leslie Salt Co., supra*, at p. 636.)" (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.)

Cullen contends that the trial court erred in sustaining the demurrer. He argues that he should not have been barred under the statute of limitations pertaining to legal malpractice, section 340.6[2], for two reasons. The first is

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[2] Section 340.6 in pertinent part provides:

"An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exist:

(1) The plaintiff has not sustained actual injury;

"....

(3) The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this subdivision shall toll only the four year limitation;. . . ."

that he suffered no "actual damages" until the order denying him leave to amend the cross-complaint. The second is that he pled actual fraud in concealing the failure to file a governmental tort claim. We will discuss these claims seriatim; neither is persuasively supported and the contention of error is not meritorious.

II

Cullen claims that his cause of action is timely under section 340.6 because he suffered no "actual damages" until the order denying him leave to amend the cross-complaint. He asserts he "discover[ed] . . . the facts constituting the wrongful act or omission" of Counsel in the allegedly wrongful failure to prepare the case for trial in June 1987.

The question is when did Cullen "sustain actual injury" within the meaning of the statute. Defendants argue that Cullen sustained injury in 1987 when the adverse judgment was entered against Cullen Development Company, among other reasons, because "his interest in all partnership claims against the Housing Authority were [sic] lost and he had sustained injury at that time." The argument is persuasive.

The statutory provision that the limitations period is tolled during the time "the plaintiff has not sustained actual injury" is premised upon the view that the cause of action does not accrue until the alleged negligence results in some actionable harm to the plaintiff.

> "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty,

> causing only nominal damages, speculative harm, or the threat of future harm – not yet realized – does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice. Prosser states the proposition succinctly, 'It follows that the statute of limitations does not begin to run against a negligence action until some damage has occurred.' [¶] The cause of action arises, however, before the client sustains all, or even the greater part, of the damages occasioned by his attorney's negligence. Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue." (Budd v. Nixen (1971) 6 Cal.3d 195, 200-201, citations and fn. omitted.)

Cullen submits that he suffered no appreciable harm by reason of the adverse judgment in 1987 because the action was stayed with respect to his liability and his cross-claim against the Housing Authority. Cullen's implicit claim is that the harm he suffered while wearing his partnership hat cannot be considered harm to him under his individual hat. This is not persuasive.

"The underlying fallacy in respondent's argument is the assumption that the partnership is a distinct unit, separate from the members thereof. Occasional suggestions of this 'entity' theory of partnership are found in statutes or decisions, but apart from exceptional situations, a partnership is not considered an entity, but an association of individuals." (Reed v. Industrial Acc. Com. (1937) 10 Cal.2d 191, 192-193.) "A partner is a coowner

with the other partners of specific partnership property holding as a tenant in partnership." (Corp. Code, § 15025, subd. (1).) As related, Cullen alleged in his first verified complaint that the partnership suffered the loss of a valuable property right, a chose in action, under the adverse judgment by reason of the alleged malpractice of Counsel. Cullen suffered appreciable harm in the loss or destruction of this partnership property of which he was a coowner.

As a partner Cullen could have commenced an action to recover for the alleged malpractice upon the entry of the adverse judgment on the partnership's cross-complaint. (See Laird v. Blacker (1992) 2 Cal.4th 606, 615; Corp. Code, § 15009; see generally Owens v. Palos Verdes Monaco (1983) 142 Cal.App.3d 855.) The policy of the statutes of limitation is one of repose, to preclude the assertion of stale claims. (See 3 Witkin, Cal. Procedure, supra, Actions, § 309.) In these circumstances, an exceptional recognition of a partnership "entity" theory would defeat this policy and is unwarranted.

Cullen also makes a protracted argument that is an attempted collateral attack in this court on the judgment in 1987 in an independent lawsuit. He argues that judgment should be found "not controlling in the case at bar" because in his view the trial court in that lawsuit erred in failing to stay the proceedings against his partners and Cullen Development Company as a result of his filing of a bankruptcy petition. He argues that the trial court in that lawsuit lacked jurisdiction to enter judgment against his codefendants because it had an adverse effect on his bankruptcy estate. He requests that we "vacate" the 1987 judgment in the Housing Authority action. He also

argues that the degree of misconduct of Counsel was so egregious as to warrant equitable relief from the adverse 1987 judgment.

We imply no view on the potential merit of these arguments if raised in an appropriate forum. This is not such a forum. The 1987 judgment was obtained in an entirely different action than the one we review. It runs in favor of a different party. If the 1987 judgment can be "vacated" or otherwise overcome that must occur in an action to which the parties to that judgment are joined. If Cullen were to succeed in such an endeavor he could pursue his original remedy against the alleged underlying malefactor and has no claim against Counsel for depriving him of that remedy. If not, then it follows, as Cullen himself artlessly suggests, harm was done to him in the entry of the judgment in 1987 and at that point time under the one year period of limitations provided in section 340.6 pertaining to his cause of action against Counsel began to run.

III

Failing these claims Cullen argues that the statute of limitations was tolled until his discovery that defendants fraudulently concealed their alleged negligence in failing to file a governmental tort claim which would have allowed them to plead a tort theory in the cross-complaint against the Housing Authority as an alternative to the contract theory which was plead. This, he argues, renders section 340.6 inapplicable.

This theory is based upon the view that, in addition to the cause of action for malpractice for abandonment of

his defense to the Housing Authority action, Cullen stated a cause of action for fraud relating to his cross-complaint which could be maintained within three years of discovery under section 338, subdivision (d).[3] That discovery, so he alleges, occurred in August 1989 when he became aware of the concealment. The argument does not attend to the language of section 340.6, which distinguishes between "actual fraud", that is excepted from its ambit, and "wilfully conceal[ing] the facts constituting the wrongful act or omission when such facts are known to the attorney. . . . "

Regardless of that distinction, Cullen's argument fails for the reason that the alleged fraud was not the legal cause of his injuries. "[T]he actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent." (Rest.2d Torts, § 432, subd. (1).) As discussed above, Cullen's interests were injured when the judgment was entered against Cullen Development Company in favor of the Housing Authority on its complaint and against the company on its cross-complaint. As explained, the statute of limitations started to run on regarding Cullen's malpractice claims predicated upon defendants' failures to defend against the Housing

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[3] Section 338, subdivision (d), provides a three year period of limitation for "An action for relief on the ground of fraud or mistake. The cause of action in that case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

Authority action. For the same reason the statute of limitations started to run against Cullen's malpractice claims regarding the cross-complaint.

Cullen seeks to prize off a tort theory of liability from the contract theory which was pled in the cross-complaint. He claims the tort theory could have been brought if a governmental tort claim had been filed against the public entity. As to this theory he claims the statute of limitations was tolled until discovery of the reason why the tort theory was not pursued. The viability of this theory is dependent upon its survivability as an independent cause of action. That is the defect in the argument.

Whether the cross-complaint sounded in tort or in contract or both, it advanced but one cause of action. Had the defendants done what Cullen says they should have done, i.e., timely filed a tort claim and amended the cross-complaint to advance this as an additional but alternative theory of recovery, the unfavorable default judgment nonetheless would have been entered in the Housing Authority case and would have barred any subsequent action on the claim. The judgment entered in favor of the Housing Authority adjudicated the merits of Cullen's crosscomplaint against the Housing Authority regardless of theory of recovery. (See generally, Perry v. Robertson (1988) 201 Cal.App.3d 333.) The cause of harm to Cullen thus occurred at the point of entry of the judgment on the cross-complaint. For the reasons already advanced, the statute of limitations then began to run on claims arising out of loss of that cause of action. The alleged failure to plead the tort theory and the "fraudulent" failure to disclose the reason did not cause Cullen

any harm because it cannot be said that Cullen would have recovered "but for" these wrongs.

DISPOSITION

Cullen's motion for judicial notice on this appeal of certain materials in the record of his appeal in the Housing Authority v. Cullen litigation is denied. The judgment (order of dismissal) is affirmed.

BLEASE, J.

We concur:

PUGLIA, P. J.

SCOTLAND, J.

APPENDIX B

NOT FOR PUBLICATION

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

MARK T. CULLEN, Plaintiff and Appellant, v. TRAINOR, ROBERTSON, SMITS & WADE et al., Defendants and Respondents.	)	C-12365 (Super. Ct. No. CV520230)

OPINION ON DENIAL OF PETITION FOR REHEARING

(Filed Feb. 1, 1993)

Cullen petitions for a rehearing. His sole noteworthy complaint is that the opinion's principal theory of resolution of his fraud claim does not squarely extend to part of his case. While the point has arguable merit, the underlying claim has no merit for reasons that closely parallel those given in the opinion.

Cullen had worked on four construction contracts for the Housing Authority, all of which were cancelled in April 1985. The Housing Authority filed its suit, in July 1985, for breach of contract as to only one of these, the Rio Linda contract. Cullen retained the defendant law firm and they agreed to file a cross-complaint for damages for breach on all four contracts on tort and contract

theories. The cross-complaint defendants filed, in February 1987, was limited to the Rio Linda contract and only presented a theory sounding in contract. As explained in the opinion, Cullen sustained actual injury when this cause of action was lost in the trial of June 1987.

Cullen represented himself thereafter. He alleged that, when he learned of the Tort Claims Act in law school in the fall of 1989, he discovered defendants had defrauded him by failing to tell him that they had impaired his opportunity to pursue tort theories on the four causes of action. On August 14, 1990, he filed a motion to amend his existing cross-complaint, apparently seeking, inter alia, to add counts stating causes of action for damages on the other three contracts. The Housing Authority opposed this motion and it was denied.

Cullen suggests that the theory in the opinion rejecting his fraud claim for lack of causation of harm only pertains to the Rio Linda contract cause of action that had been stated in the original cross-complaint. He argues that he was defrauded by defendants concealing their failure to file government tort claims as to the other three contracts, and as to this he suffered no actual harm until the denial of his motion to amend in 1990. He submits that the statute of limitations to litigate the three other contract claims was not barred by the statute of limitations because "they relate back" to the date the Housing Authority sued him on the Rio Linda contract.

The relation back theory is untenable. (See 5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, §§ 1161-1162.) A claim of breach of separate contracts concerning the construction of structures at different locations is a wholly

different legal liability or obligation from that stated in the original cross-complaint and cannot relate back for purposes of evading the statute of limitations.

Cullen knew in 1987 that the cross-complaint prepared by defendants did not put in issue the other three contract causes of action. He took no action to pursue these causes until 1990. Assuming for the sake of discussion that defendants concealed a failure to file government tort claims concerning these contracts, no harm to Cullen can be attributed to this delict.

These causes of action must have arisen prior to April 1985 when all of the contracts were terminated. If, as Cullen suggests, these were independent causes of action, he was free to pursue them in an independent action or to move to amend and include them in the existing action. The failure to do so until after the expiration of the period of limitations on an action for breach of contract is the cause of any harm for loss of a judicial remedy on the causes of action. Defendants' failure to disclose that they had not filed government tort claims did not prevent Cullen from pursuing these causes of action on a theory sounding in contract. Having slept on his rights sounding in contract, if any, to recover from the Housing Authority for the breach of these three contracts, Cullen cannot recover from his former counsel for failing to perfect a potential *alternative* remedy, for the reasons given in the opinion.

The petition for rehearing is denied.

BLEASE, J.

We concur:

PUGLIA, P. J.

SCOTLAND, J.

APPENDIX C

Third Appellate District No. C012365
S031216

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

(Filed March 31, 1993)

MARK T. CULLEN, Appellant

v.

ROBERTSON, SMITS & WADE TRAINOR Et Al.,
Respondents

Appellant's petition for review DENIED.

LUCAS
Chief Justice